No. 16,130

IN THE

United States Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant,

vs.

MARGARET L. GRANT,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

There appear to be only a few points raised in Brief of Appellee that call for comment here.

Appellee contends that, because the trial court took testimony to construe the contract, its construction is binding upon this Court. (Brief of Appellee, pp. 30-31.)

A. THIS COURT IS ENTITLED TO AND SHOULD CONSTRUE AND INTERPRET THE DOCUMENTS CLAIMED TO CONSTITUTE A CONTRACT OF INSURANCE.

It should be noted that at the trial Appellee introduced extrinsic evidence not for the purpose of vary-

ing the terms and conditions of the alleged contract (Exhibits 1 and 2) but to explain the terms thereof. (R. 92, 168-170.)

California Jurisprudence, in discussing the extrinsic evidence rule as a rule of exclusion, states an exception as follows:

> "The rule of exclusion does not apply where the extrinsic evidence offered is not inconsistent with and does not change, contradict or conflict with the terms embodied in the instrument, but merely explains them. . . ."
>
> 18 *Cal. Jur.* 2d 739.

The foregoing is the exception upon which Appellee relied to explain about Mr. Grant having a medical examination. The conversation took place the evening of August 10, 1954, and Appellee, on direct and cross-examination, in her case in chief, established that Mr. Grant knew he had to have a medical examination "for this insurance" and that later she made the arrangements for such examination. (Appellant's Brief, pp. 5-8.)

B. THE DOCUMENTS ARE CLEAR AND UNAMBIGUOUS.

The reference in Brief of Appellee, page 30, to the trial court's opinion does not refer to any specific finding or conclusion concerning ambiguity. At no time during the trial of this case did the trial court indicate in its comments or rulings, or otherwise, that it found or viewed the application and receipt, or either of them, to be ambiguous.

The trial court, in its opinion, said (R. 37), "I find very little difference in this case and the case of Ransom v. Penn Mutual."

Statements in the memorandum opinion of the trial court may not be used to ascertain the evidence or the facts or to control or modify the findings of fact upon which the judgment is based. Resort cannot be had to the opinion to eke out findings of fact.

American Insurance Co. v. Scheufler (8 Cir. 1942), 129 F. 2d 143, 146;

Bing v. Bing (1959), 168 A.C.A. 430, ... P. 2d .....

Citing the trial court's comment (Appellee's Brief, 30) as a finding of ambiguity begs the whole question. Appellee has failed to show why this Court should not construe Exhibits 1 and 2 as other courts have done. This particular type of application and receipt never have been construed by the Supreme Court of California. In *Ransom v. Penn Mutual,* 43 C. 2d 420, 274 P. 2d 633, the California Supreme Court construed an entirely different application. Appellee seeks to force that case to fit the evidence in this one, but it is like trying to fit a square peg into a round hole. Her argument on the application is like one who tears off one page of a voluminous newspaper and, displaying that one page, says "Here is the complete newspaper. That is all there is to it and you cannot consider the rest of it." Such argument and reasoning, of course, are specious.

An illustration appears in Brief of Appellee (pp. 22-28) where counsel takes part A of the application

and receipt and lifts a sentence out of the context here and there and then argues in a circle instead of taking the document as a whole and giving weight to the clear and unambiguous language.

Where extrinsic evidence is uncontradicted and is in accord with the terms of the contract, the appellate court is not bound in any way by the interpretation thereof by the trial court.

Milton v. Hudson Sales Corp. (1957), 152 C.A. 2d 418, 433-434, 313 P. 2d 936, 946.

Appellee briefly passes over California Insurance Code §10115. This Court, however, has given it consideration. (See *Lloyd v. Franklin Life Insurance Company* (9 Cir. 1957), 245 F. 2d 896.)

C. NO ASSUMPTION BY MR. GRANT.

There is no evidence that Mr. Grant made any assumption that the insurance would be effective when the premium was paid. Please refer to Brief of Appellee, page 7, where it says: "Mr. and Mrs. Grant assumed that it was in effect when the premium was paid", and Footnote 3.

The statement to the effect they both assumed the insurance was in effect when the premium was paid is incorrect and is not supported by the portion of the record quoted on page 7 of the Brief, or any other part of the Record itself. After Mrs. Grant testified, "No, we assumed" she was given every opportunity to explain by the next question: "What is that?" and

she answered: "I assumed that it was in effect when we paid the premium." That testimony does not establish that Mr. Grant assumed anything about when the insurance applied for would be effective. What Appellee assumed is of no moment because she was not a party to any contract. She was named as beneficiary in the application but Mr. Grant reserved the right to change the beneficiary. (See Exhibit 1, part A, No. 19(a).) Under those circumstances Appellee was merely a third party beneficiary with no interest in the contract during Grant's lifetime but had a mere expectancy.

McEwen v. New York Life, 23 C.A. 694, 139 P. 242.

D. JULY 20, 1954 LETTER WAS SHOWN TO MR. GRANT.

Another matter of evidence should be clarified. On page 5 of Brief of Appellee there is discussion of Exhibit D: the letter of July 20, 1954. There is a footnote on this subject and above that the statement is made, "This letter was not shown to the Grants." That is misleading. The fact is that Mr. Price showed the letter to Mr. Grant. Appellee admits that in the footnote. It is immaterial whether it was shown to Mrs. Grant for she was not a party to the alleged contract. She admitted there were conversations between Grant and Price she did not know about. (R. 133.) Exhibit E, letter of Mr. Wigham dated July 26, 1954 (to which counsel withdrew all objections, R.

172) indicates that Price did see Grant shortly before July 26, 1954. It corroborates Price's testimony that he did show Exhibit D, the letter of July 20, 1954, to Mr. Grant. That was after Price had received it from Mr. Wigham and before he returned it to the Monterey District Office. The proper fact, and the only one, is that he did show it to Grant. Appellee admits (her Brief 5, Footnote 2) that this letter of July 20, 1954, would put Grant on notice that Appellant "did not intend insurance coverage to be effective as soon as the premium was paid."

Appellee again refers to this matter on page 12 of her Brief wherein she says, Price "testified on direct that he showed Exhibit D to Peter Grant; but cross-examination established that he could not conceivably have done so as he did not see the Grants during the approximately 10 days when that letter was in his possession." Here again that statement of Appellee is misleading if it is intended to mean that Price did not see Grant. Whose "cross-examination" is referred to is not clear; but, if Appellee means Price's cross-examination, there is nothing in that cross-examination to the effect that he did not see Mr. Grant during the approximately 10 days. Nowhere does Mrs. Grant testify that Price did not see or have a conversation with Mr. Grant during that period of time. Therefore, Price's testimony that he did show the letter of July 20, 1954, to Mr. Grant stands uncontradicted and undisputed. The most that can be said by Appellee is that she was not there when Mr. Price showed Mr. Grant the letter.

E. THERE IS NOTHING UNCONSCIONABLE OR DISHONEST ABOUT THIS TRANSACTION.

Appellee makes a considerable point of "unconscionableness" and "dishonest dealing" by citing cases and arguing the point.

Gaunt v. John Hancock Mutual Life, 160 F. 2d 599 is not in point here because there the completed application was received and approved. See *Corn v. United American Life Ins. Co.,* 104 F. Supp. 612 where the *Gaunt* case is distinguished. Neither *Ransom v. Penn Mutual,* nor any case cited therein, held a contract of insurance existed without at least a medical examination, where one was required.

In the instant case the application and receipt provide that *if this* application (not just part A) is approved at the company's Home Office for the class, plan and amount of insurance herein applied for, *then* the insurance in accordance with the terms applied for shall be in force from the date hereof, and, of course, there is the printed and written matter about the "Appointment for Medical Examination."

The applicant gains a distinct advantage in that *if* the completed application is approved, the insurance company will pay even if the applicant dies between the date of the receipt and before the issuance and delivery of the policy.

Hyder v. Metropolitan (S.C.), 190 S.E. 239, 245.

There is nothing "unconscionable" or "dishonest" about the purchaser of life insurance paying for an advantage that he otherwise would not have.

CONCLUSION.

The Record shows that the Appellee herself introduced evidence not to vary the terms of the alleged contract but to explain them, and it fully explains that portion of the receipt about the medical examination to the effect that Grant knew he had to go to Dr. Blaisdell for a medical examination for this insurance. Appellee is bound by her own testimony. Mr. Grant also knew, because of Exhibit D, the letter of July 20, 1954, that the Appellant, at its head office in San Francisco, would have to view all the completed papers before they could act upon the application. This, of course, is clear by the language in part A of the application and the receipt.

The state of the evidence is such that this Court is not bound by the construction of the trial court, but can and should interpret Exhibits 1 and 2 and arrive at its own conclusion as to whether or not a contract of insurance was in existence at the date of Peter Grant's death.

There are no authorities cited in Appellee's Brief that require this Court to refrain from exercising its judicial mentality in placing its own interpretation upon the alleged contract of insurance. None of the cases cited in Appellee's Brief are authority for the proposition that this Honorable Court is bound by the interpretation of the trial court. The cases cited on page 31 of Brief of Appellee are not in point here. This Court is not enjoined from exercising its judicial reasoning in arriving at its own interpretation. Here the trial court found no ambiguity nor was there any

conflict of fact in the extrinsic evidence. Avowedly, Appellee's purpose in putting in such evidence was to explain and not to vary the writings.

It is respectfully submitted that the judgment should be reversed and judgment entered in favor of Appellant.

Dated, San Francisco, California,
April 1, 1959.

Respectfully submitted,
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